Decision **DRAFT DECISION OF ALJ VIETH** (Mailed 1/24/2006)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Douglas J. and Sherri L. Massongill, Complainants, vs. Hillview Water Company, Inc., Defendant.	Case 05-10-002 (Filed October 3, 2005)

OPINION DENYING COMPLAINT

Summary

This decision denies the complaint against Hillview Water Company, Inc. (Hillview) filed by Douglas J. and Sherri L. Massongill. Complainants own an undeveloped parcel which is subject to the moratorium on new service connections imposed because of severe water supply and quality issues in that part of Hillview's service territory. Complainants' application for service is #19 on the moratorium waiting list. The Commission finds that the fact that the undeveloped property briefly had water service in 1998 (until cancelled by the prior owners) does not qualify the property for an exemption from the moratorium.

Background and Procedural History

Hillview is a Class C water utility that serves slightly less than 1,400 customers in the foothills of eastern Madera County, southwest of Yosemite National Park.[1] Oakhurst-Sierra Lakes is one of four separate operating systems within Hillview; the others are Hillview-Goldside, Raymond, and Coarsegold Highlands. As we noted in Decision (D.) 05-07-029, which resolved Hillview's general rate case, the water supply for all of the operating systems comes from hard rock wells and much of it has high mineral and metal concentrations.

D.01-10-025, one of several decisions issued during the pendency of a Commission-initiated investigation into Hillview's operations (Investigation 97-07-018), imposed a moratorium on new service connections in Oakhurst-Sierra Lakes. The moratorium, part of a settlement reached in the course of the investigation, responded to serious supply problems in Oakhurst-Sierra Lakes attributable to a generally constrained water supply made worse by the need to dilute high levels of uranium in some wells.

D.01-10-025 views the moratorium as a temporary solution and states:

> A more permanent solution is needed, and we anticipate that a major component of that solution will be the addition of a treatment facility that will more effectively remove the uranium from Hillview's present supply. (D.01-10-025, slip op p. 7.)

The adopted settlement contemplated that Hillview would file an advice letter to rescind the moratorium when it obtained "an adequate supply of water

[1] A Class C water utility is one with more than 500 service connections but fewer than 2,000.

as determined by the Department of Health Service." (D.01-10-025, Attachment 1, Paragraph 41.) The supply problems in Oakhurst-Sierra Lakes persist to date.

Complainants filed this complaint on October 3, 2005 and Hillview filed an Answer on October 24. By ruling on November 28, 2005, the assigned Administrative Law Judge (ALJ) requested additional information to clarify the factual context of the dispute. Hillview filed a response on December 1, 2005 and Complainants filed a response, pursuant to an extension of time, on December 19. With the ALJ's permission, Complainants filed a further response on December 20, and a supplement on December 27.

Discussion

Complainants contend that Hillview has erroneously interpreted Pub. Util. Code § 2708 through § 2711 in advising them that a 1.64 acre parcel of land they own near Oakhurst, California is subject to the moratorium on new service connections ordered by D.01-10-025. Complainants ask the Commission to order Hillview to serve their parcel.

Complainants' acknowledge that the parcel lacked water service when they purchased it from the Davis Family Trust, the prior owner, in about 2005. They contend, however, that because the parcel was served at least briefly during 1998, prior to the moratorium imposed in April 2001, it should be considered exempt from the moratorium and service should be reinstated now. Complainants state: "Water hook ups to this property are already paid for and in place." (Attachment to Complaint.) In 2003, apparently responding to an inquiry from Mr. and Mrs. Davis about restoring service to the parcel, Hillview advised that since no application to reinstate service was on file before the moratorium took effect, the parcel could not be served until the moratorium was lifted. Mr. Davis subsequently reapplied for water service and, after the

property was sold, Complainants' were substituted as the applicants. The documentation attached to the complaint includes:

- Recordation on January 3, 2005 of a grant deed conveying the parcel from the Davis Family Trust to Complainants;
- An application for water service from Hillview by Al Davis, dated July 29, 2003;
- Hillview's July 24, 2003 letter to Mr. & Mrs. Albert B. Davis stating:

  "The fact that you have had service to your property in the past does not alter the fact that we were not actively serving the property at the time the moratorium was imposed."

- Hillview's November 25, 1998 report entitled "Monthly Closing Customers" listing an account for Al Davis, opened August, 25, 1998, and a balance of $25.02;

The ALJ's ruling inquired about the nature of the service to the parcel before the 2001 moratorium, whether the parcel has been developed beyond the installation of the water hook ups, and whether others on Hillview's moratorium waiting list essentially stand in the same shoes as Complainants – that is, whether any others are requesting service for property that was served, but had service discontinued, before the moratorium took effect.

Hillview's response addresses each of these questions. Hillview clarifies that complainants' property received domestic water service from August 1998 until November 1998, when service was stopped at the request of the prior owners. No structures have been built on the property, though it was graded for a house pad. Finally, Complainants' application is #19 on the moratorium waiting list at present. One other application, #44, also asks to reinstate service, which the owner had stopped in 1990 prior to the time the moratorium took effect.

The material information in Complainants' response does not differ from that supplied by Hillview. Complainants add that the property also has electric, propane gas, and telephone hook ups on site and that the County of Madera (Madera) has tentatively approved engineering plans for a three bedroom house and sewage system. They also state that the prior owners actually hold the majority interest in the property, via a first mortgage recorded in Madera. Complainants further response includes a copy of the 1998 application for water service (later discontinued) and a November 19, 2004 preliminary title report that states, at paragraph 11.4, that "all parcels are served by Hillview Water Co, Inc. and the system has been installed and accepted as of February 5, 1990. " (Further response, Exhibit I.) Complainants' supplemental response includes a copy of a December 7, 2005 letter from Mrs. Davis to Mrs. Massongill that confirms that the property had water service from August 25 until October 18, 1998, among other things.

There are a number of problems with Complainants' request. The first and overarching problem is that Hillview's current water supply barely meets the needs of its existing customer base. D.01-10-025, which ordered the 2001 moratorium, describes the gravity of the supply situation:

> The overwhelming weight of evidence and public comments received at the September 24 hearing demonstrate that at the present time *Hillview's water supply is already constrained, and that whatever available supply meets DHS standards is needed for dilution of the supply from the well with high uranium content*. At present there is no adequate substitute source of supply for that well, and we must make the findings required by Section 2708. (D.01-10-025, slip. op. p. 7, emphasis added.)

The controlling statute, Pub. Util. Code § 2710, sets out the framework for ordering a moratorium and establishing any variances:

> Whenever the commission, after a hearing had upon its own motion or upon complaint, finds that any water company which is a public utility operating within this State has reached the limit of its capacity to supply water and that *no further consumers of water can be supplied from the system of such utility without injuriously withdrawing the supply wholly or in part from those who have theretofore been supplied by the corporation*, the commission may order and require that no such corporation shall furnish water to any new or additional consumers until the order is vacated or modified by the commission. The *commission*, after hearing upon its own motion or upon complaint, *may also require any such water company to allow additional consumers to be served when it appears that service to additional consumers will not injuriously withdraw the supply wholly or in part from those who theretofore had been supplied* by such public utility. (Pub. Util. Code § 2710, emphasis added.)

To date, Hillview has been unable to increase its supply and thus, the supply constraint has not eased.[2] Any additional demand would diminish further the limited supply available for existing customers, contrary to Pub. Util. Code § 2710.

Complainants argue, however, that they should not be viewed as new customers but rather as "those who theretofore had been supplied" under § 2710 or as "consumers which have once been served by the corporation" under Pub. Util. Code § 2711. Section 2711 provides, in full:

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[2] On January 12, 2006, in D.06-01-005, the Commission approved a request to modify Hillview's tariff to create a limited exemption to the moratorium and some additional supply. The request was filed as an August 8, 2005 petition for modification of I.97-07-018. The approved exemption will apply to those who agree (1) to drill a new well capable of yielding more than enough water for their own needs and (2) to make the surplus supply available to Hillview. We cannot assess whether this narrow exemption will prove helpful to Complainants.

> *Section 2710 does not apply to territory or consumers which have once been served by the corporation*. As between consumers who have been voluntarily admitted to participate by the corporation in its supply of water or required to be supplied by an order of the commission, in times of water shortage the corporation shall give no priority or preference but shall apportion its supply ratably among its consumers. (Pub. Util. Code § 2711, emphasis added.)

The Commission had occasion to interpret the term "consumers" several decades ago, in D.86807 (1977 Cal. PUC LEXIS 849), in the context of a moratorium banning new connections in the Monterey Peninsula. The Commission had ordered the moratorium in the face of significant threats to the local groundwater. The combined effects of severe drought and increased use were preventing the aquifer from recharging and continued over-drafting risked salt water intrusion from the ocean. Owners of undeveloped property who wished to build argued that all lots within the utility's dedicated service territory should be considered as existing consumers under Pub. Util. Code § 2710. The Commission authorized a proposal to permit development to resume within narrow guidelines, largely because two new sources of supply were expected to come on line in three years' time. However, the Commission specifically rejected the lot owners' proposed definition of "consumers." The Commission stated:

> Webster defines "consumer" as "one who uses (economic) goods, and so diminishes or destroys their utilities". [footnote to citation omitted] We accept this definition to be the usual, ordinary, and commonly understood meaning of the word consumer as used in the context of Section 2708. [footnote to citation omitted] It seems reasonable to conclude that *had the Legislature intended that it meant "consumers" to include others than those actually using water the Legislature would have written the statute differently*. (*Id.*, 1977 Cal. PUC LEXIS 849 * 94, emphasis added.)

We see no reason that the term "consumers" should be interpreted any differently in Pub. Util. Code § 2711. Both statutes were enacted through passage of the same legislation in 1951 (Stats. 1951, Ch. 764) and have remained in the Code, unchanged, since that time. The undeveloped parcel that Complainants own has had no service since 1998, and thus, has *not* been "actually using water."

Given this reality, were Hillview to serve Complainants, it would not only violate its tariff and D.01-10-025, but it also would violate Pub. Util. Code § 453, which prohibits any utility from granting "any preference or advantage to … any person" with regard to "rates, charges, services, facilities, or in any other respect...". As noted above, Complainants' application is #19 on the moratorium waiting list; any advantage to Complainants would disadvantage 18 other applicants, as well as existing customers. We must deny the complaint.

No Need for Hearing

Complainants seek an expedited determination of this dispute in order to apply for a veteran's loan for which they have "prequalified." The complaint is ineligible for our expedited complaint procedure, because the monetary value of this dispute objectively exceeds the jurisdictional limit imposed by Pub. Util. Code § 1702.1 (i.e., the small claims court financial maximum). However, we have addressed the complaint as quickly as our resources permitted, and well within the one-year statutory timeline for resolution of other adjudicatory proceedings under Pub. Util. Code § 1701.2(d).

The documentation provided in the complaint and in the responses to the ALJ's ruling provides a complete factual record and leaves no disputed issues of material fact for evidentiary hearing. Thus, no hearings are necessary and Article 2.5 of the Commission's Rules of Practice and Procedure ceases to apply to this proceeding, with the exception of the ex parte prohibition in Rule 7.

Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed on _____.

Assignment of Proceeding

Michael R. Peevey is the Assigned Commissioner, following the resignation of Commissioner Kennedy, and Jean Vieth is the assigned ALJ in this proceeding.

Findings of Fact

1. Complainants' parcel, which is undeveloped, had water service from August 1998 until November 1998. In November 1998, the prior owners asked Hillview to discontinue service.

2. Complainants' parcel had no water service when the moratorium was imposed in 2001 and the prior owner did not apply to reinstate water service until July, 2003.

3. Complainants have assumed the prior owner's application for water service. Their application is #19 on the moratorium waiting list.

Conclusions of Law

1. The complaint should be decided on the pleadings, since no triable issue of fact has been established.

2. No hearing is necessary.

3. In declining to serve Complainants' parcel, Hillview has acted in conformity with D.01-10-025 and its tariff, and has interpreted and applied Pub. Util. Code §§ 2710 and 2711 reasonably.

4. The complaint should be denied.

5. To provide certainty to the parties in as timely a manner as possible, this opinion should be effective immediately.

O R D E R

IT IS ORDERED that:

1. The complaint in Case (C.) 05-10-002 is denied.
2. C.05-10-002 is closed.

This order is effective today.

Dated _____, at San Francisco, California.